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UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
WESTERN DIVISION

Viola Hubbs, individually, and on behalf of other members of the general public similarly situated,

Plaintiff,

vs.

Big Lots Stores, Inc., an Ohio corporation; PNS Stores, Inc., an Ohio corporation; and Does 1 through 10, inclusive,

Defendants.

CASE NO. 2:15-cv-01601-JAK-AS

DEFENDANTS' OPPOSITION TO PLAINTIFFS' MOTION FOR CLASS CERTIFICATION

[Filed concurrently with Declaration of Mark A. Knueve; Declaration of Letty Jeric, Declaration of Theresa Oakley, , Declaration of Steven Tuscher, Declaration of Augustin Serrato, Declaration of Mani Algarsamy;, Declarations of Putative Class Members, Rebuttal Expert Report of Brendan Burke, Defendants' Request for Judicial Notice]

Judge: Hon. John A. Kronstadt
Date: May 15, 2017
Time: 8:30 a.m.
Ctrm: 10B
Trial Date: January 16, 2018

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INTRODUCTION

For three years, Plaintiffs have cast about for a theory in a desperate bid to get any class certified. The results are manifest. Plaintiffs seek to certify three claims (overnight shifts and bonuses) that are not identified in the operative complaint, and thus may not be certified. *Compare* ECF 87, pp. 1-2 *to* ECF 56.

Plaintiffs' Motion also misrepresents (or omits) material facts in an effort to manufacture "common" issues. For example, Plaintiffs falsely assert that associates must always have a bag check prior to exiting the store, regardless of whether they brought a bag. ECF 87, p. 2, 12. However, Plaintiffs themselves testified that Big Lots only conducted checks if associates brought bags. The Security Inspection Class is not ascertainable and individualized inquiries predominate.

Plaintiffs also falsely assert that Big Lots "does not include bonuses in the calculation of the regular rate of pay for overtime wages…." ECF 87, p. 21. However, the bonus plan states that the calculation includes overtime, Defendants described the calculation in responses to interrogatories, and Regional Team Leader Bill Boas testified that the calculation includes overtime. Plaintiffs have presented no competent evidence of a common unlawful policy.

Plaintiffs also falsely assert that associates working an overnight shift were not permitted to leave the store during meal breaks.[1] ECF 87, p. 18. Plaintiffs have produced no evidence that any associate was prohibited from leaving the store during a meal break, while Defendants produce herewith evidence that associates were permitted to leave. Plaintiffs lack significant proof of a common unlawful policy, individualized inquiries predominate, and the two "overnight shift" subclasses may not be certified.

Plaintiffs also falsely assert that "Big Lots admitted a practice of not paying rest breaks to its California employees." Big Lots has a lawful rest break policy, and

[1] Plaintiffs also assert that the law requires employers to allow employees to leave the premises during rest breaks. ECF 87, pp. 18-19. This is not so. *Infra*, FN 28.

produced documents stating that it pays premiums under appropriate circumstances, and Human Resources Manager Letty Jeric described the process. Plaintiffs have not presented significant proof of a common unlawful policy, individualized inquiries predominate, and the Rest Break Premium Class may not be certified.

For the Closing Shift Class, Plaintiffs rely upon the alleged "gap between the … end of shift time and the time the store's alarm was set." Big Lots' time clock is not synchronized with the alarm provider's clocks, and there is no reason to believe that any "gap in time" is reliable. Even if it were, Big Lots' closing procedure is the same one that has been found by this Court to be lawful. There is not significant proof of a common unlawful policy, and individualized inquiries predominate.

Rarely have plaintiffs in a class action produced so little evidence of common unlawful policies and so brazenly misrepresented the Record. The Court is required to conduct a "rigorous analysis" to determine whether Plaintiffs have met the requirements of Rule 23, and consider the merits as necessary to determine whether there are indeed common certifiable issues. Such an analysis is particularly appropriate here. There is no reason for this Court to put its imprimatur on any of the proposed subclasses, and they should not be certified.

STATEMENT OF FACTS

A. Big Lots, Its Stores, And The Named Plaintiffs.

Big Lots operates 156 stores in California. (Jeric Dec. at 3). Each store is usually managed by a Store Team Leader and one or more Assistant Team Leaders. Store associates, mostly part-time, report to the management team. (*Id.* at 4).

Defendants employed Viola Hubbs as a part-time associate from July 2010 to August 2013 in Los Angeles. (Hubbs Depo. 25:7-21, 62:17-21, 122:6-8). Defendants employed Brandon Coleman from 2005 to 2015 and Tamika Williams from 2010 to 2015 in San Bernardino. (Coleman Dep. 26:14-25, 31:6-33:13; Williams Depo. 32:1-4). During the relevant period, Coleman worked as a Furniture Manager/Furniture Lead and Williams worked as an associate and Associate

Manager.[2] (Williams Dep. 34:19-36:5; Coleman Dep. 33:12-34:11).

B. Big Lots Prohibits Off-The-Clock Work.

Upon hire, employees receive and review an Associate Handbook. (Boas Dep. 252:9-12, 261:8-15; Jeric Decl. 7). Employees sign an acknowledgment verifying that they received and understand the policies in the Handbook. (Williams Dep. 47:22-48:22, Ex. 03; Hubbs Dep. 31:5-18; Coleman Dep. 42:17-43:19; Ex. 03). The Handbook prohibits off-the-clock work, states that it is each employee's responsibility to accurately record time worked, and cautions that a failure to record time accurately is a severe violation of Company policy. (Jeric Dep. 99:5-22, Ex. 9). An online policy also states that "off-the-clock" work is prohibited and that employees must be paid for all hours worked. (Boas Dep. 26:7-25:5, Ex. 2). Associates can make a complaint through a manager, Human Resources, or the Get Real line. (Jeric Dep. 33:3-12, 55:3-5, 102:25-103:5, 146:13-17).

Plaintiffs knew that Big Lots' policy prohibited off-the-clock work. (Williams Dep. 51:4-8, 156:8; Hubbs Dep. 32:19-33:7; Coleman Depo. 65:17-66:1). Coleman enforced this policy with respect to the associates he supervised. (Coleman Dep. 69:3-13). Employees throughout California also declared that they are aware of the policy prohibiting work off-the-clock, that they were instructed to never work off-the-clock, and that they never worked off-the-clock.[3]

C. Big Lots' Lawful Closing Policy and Procedures.

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[2] As managers, Williams and Coleman were responsible for enforcing Company policy. (Williams Dep. 48:3-8, 165:22-25; Coleman Dep. 47:21-48:8, 69:9-13).

[3] *See* Aguilar Decl. 15; Albanez Decl. 15, 16; Aquilina Decl. 18, 19; Bictoria Decl. 15, 16; Bun Decl. 16; Camacho Decl. 15, 16; Camarena Decl. 16; Casillas Decl. 15, 16; Cesena Decl. 15, 16; Delgado Decl. 11; Der Decl. 20, 21; Diaz Decl. 17, 18; Doornbos Decl. 15, 16; Duran Decl. 17, 18; Fleck Decl. 19, 20; Garcia, M. Decl. 19, 20; Garcia, S. Decl. 15, 16; Garcia, Y. Decl. 13; Ghanem Decl. 15, 16; Harris Decl. 17; Kennedy Decl. 16, 17; Lara Decl. 13; Lopez Decl. 18, 19; Mercado Decl. 17, 18; Milner Decl. 21, 22; Mitchell Decl. 20, 22; Oldehaver Decl. 14, 15; Oliva Decl. 14; Rael Decl. 18, 19; Saldivar Decl. 15; Salmeron Decl. 14; Straub Decl. 18, 19; Torres Decl. 14, 15; Valdez Decl. 13; Valerio Decl. 15, 16; Vasquez Decl. 15, 16; Villanueva Decl. 18, 19; Yi Decl. 15, 16; Zavala Decl. 16, 17.

After close, the store's doors are locked and a manager and one or two associates complete closing procedures. (Milner Decl. 20; Coleman Dep. 156:12-157:14, 163:7-164:5; Boas Dep. 93:6-17, 95:14-22, Ex. 9). All duties and any bag checks are to be done on the clock.[4] (Boas Dep. 44:1-4; 88:9-21; Jeric Dep. 193:2-4). When all duties are completed, the manager and associate(s) walk to a time clock in the front of the store, clock out, and walk about ten feet to the alarm. (Coleman Dep. 16:19-23; Boas Dep. 88:3-6, 89:4-24; Williams Dep. 118:5-119:3). The manager sets the alarm by punching a 4-digit code and pushing an "arm" button. (Boas Dep. 87:13-89:24, 97:1-5; Coleman Dep. 164:19-23; Zuccala Dep. 41:14-42:24, 45:1-18). Associates must leave the store within 45 seconds of setting the alarm. (Boas Dep. 87:13-16; Zuccala Dep. 46:5-13).

The alarm system is operated by third parties and any records are maintained by them. (Zuccala Dep. 26:6-27:10, 50:10-22; Jeric Dec. 11). Big Lots' time clock is not synchronized with the alarms' clocks. (Zuccala Dep. 96:23-97:16). As such, the time on the alarm and the time on the time clock may not be the same. Alarms at each store are not synchronized with other stores. (*Id.* at 48:15-49:10).

Williams testified that she clocked out, did bag checks,[5] set the alarm, and left. (Williams Dep. 118: 2-4, 134:4-12). She testified that the alarm was 6 to 10 feet from the exit and it took "a couple seconds" to set it. (Williams Dep. 118:5-119:3). Coleman testified that he finished cleaning, clocked out, and left. (Coleman Dep. 164:6-23). He claimed that it took "about a minute" to set the alarm. (*Id.* at 164:24-25). If someone had a bag, Coleman checked it before setting the alarm. (*Id.* at 165:1-18). Depending on the number of people who had bags, this all could take one to five minutes. (*Id.* at 165:13-166:2). Since there were typically only two

[4] Letty Jeric, the Human Resources manager for California, was not aware of complaints of off-the-clock work at closing. (Jeric Dep. 115:8-23).

[5] Plaintiffs testified that they did bag checks off-the-clock right before they left. (Coleman Dep. 151:19-24). Coleman conceded that no one told him that bag checks should be done off-the-clock. *Id.*

employees at closing, it was generally the lower end of that range. (*Id.* at 166:3-7).

Numerous employees working closing shifts declared that they left the store within a minute or less of clocking out.[6] Others declared that the entire process between clocking out and exiting took a minute or two.[7]

Plaintiffs' expert's report on this issue is unreliable due to the lack of synchronization, and other issues. (*See* Declaration of Brendan Burke at ¶¶ 7-11). However, Plaintiffs' expert opined that the most common time between the last clock out and the alarm set was "approximately one minute," with a median "gap" of 2 minutes. (Declaration of Keith Mendes (ECF 87-40), at p. 8 No. 29 and n. 22).

D. Big Lots' Lawful Bag Check Policy and Practice.

Big Lots' policy calls for checks for employees with "a bag, briefcase and/or box." (Boas Dep. 109:11-111:1, Ex. 11). Bill Boas, who supervises California, confirmed that employees without bags do not receive checks. (Boas Dep. 280:23-281:4). Plaintiffs testified that employees without bags were not checked. (Williams Dep. 128:3-15; Hubbs Dep. 43:9-16, 59:13-17; Coleman Dep. 138:14-24, 143:1-2).

Indeed, a number of stores do not perform bag checks at all.[8] Moreover, many associates (including Coleman) testified that they did not bring bags to work, and thus never had a check.[9] Employees could avoid checks in other ways. Coleman brought his lunch in a disposable bag that he could throw away so that he did not have a check. (Coleman Dep. 140:14-20). If an employee purchased an item during a break, she could immediately put the merchandise in a car and avoid a check. (Hubbs Dep. 61:18-24, 63:4-12; Coleman Dep. 139:6-17).

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[6] Bictoria Decl. 14 ("The entire time between when we clock out and when leave takes only seconds."); Bun Decl. 15 ("The entire process from when I clocked out to when I left the store took less than a minute."); Der Decl. 18 (same); Harris Decl. 16 (same); Diaz Decl. 16; Doornbos Decl. 14 ("It only takes about 30 seconds between us clocking out and us actually leaving the store."); Fleck Decl. 18 (same); Lopez, A. Decl. 16-17 ("During closing shift, bag checks are performed before we clock out….The entire process between when I clock out to when I leave the store takes no more than three seconds."); Milner Decl. 20 ("I would be surprised if the entire process between when we clock out when we leave takes more than 15 seconds, but I know it does not take more than 45 seconds because that is how long we have to get out before we trigger the alarm."). *See also* Aquilina Decl. 17; Oldehaver Decl. 13; Villanueva Decl. 17; Casillas Decl. 14; Diaz Decl. 16.

[7] Kennedy Decl. ("The entire process from when we clock out to when we are out of the store takes at most two minutes, probably less."); Camacho Decl. 14 ("The entire process takes about two minutes from when we clock out to when we leave the store."). *See also* Garcia, S. Decl. 14; Valdez Decl. 12; Zavala Decl. 15.

[8] *See* Jeric Dep. 192:12-16 ("not all stores conduct bag checks"); Cesena Decl. 13 ("We do not do bag checks at this store. We stopped doing bag checks three and a half years ago."); Straub Decl. 14 ("Now that the store has installed sensors, no bag checks are performed at the front of the store."). *See also* Ghanem Decl. 13; Oliva Decl. 12; Saldivar Decl. 13.

Boas and Jeric testified that bag checks (if any) should be performed on the clock. (Boas Dep. 44:1-4; 88:9-21; Jeric Dep. 193:2-4). Coleman understood that policy did not require checks to be done "off-the-clock" and that no manager ever told him that checks had to be done "off-the-clock." (Coleman Dep. 151:19-24). Numerous associates declared that bag checks were "on the clock" or simultaneous with clocking out. (Camarena Decl. 15 "(I clock out after the bag check before I leave the store."); Kennedy Decl. ("We clock out at the register so that the bag check can occur while we are clocking out."); Garcia, M. Decl. 16 ("[A]ssociates are permitted to remain on the clock during the bag check and clock out afterwards. I have seen associates have their bag checked and then clock out."); Rael Decl 15 ("No one has ever told me that I have to clock out before having my bag checked."); Vasquez Decl. 13 ("No one has ever told me that I have to clock out before I have my bag checked.")).

Bag checks occurred at the front of the store where employees clock out, and were extremely brief. (Williams Dep. 111:13-18; Hubbs Dep. 45:2-8; Coleman Dep. 141:23-142:10). Hubbs and others testified that a check took only seconds.[10]

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[9] Coleman Depo. 138:14-24; Aguilar Decl. 12 ("[O]nly two or three people a day bring a bag at this store. I never bring a bag and never have to have a bag check…."); Bictoria Decl. 12 ("I never bring a bag that needs to be checked because my lunch bag is disposable."); Kennedy Decl. 13 ("I bring a bag but it is not always checked. Most of the people I work with do not bring bags."); *see also* Bun Decl. 14; Diaz Decl. 14; Doornbos Decl. 13; Duran Decl. 14; Fleck Decl. 14; Garcia, Y. Decl. 11; Harris Decl. 14; Lara Decl. 11; Mercado Decl. 15; Casillas Decl. 13.

[10] Hubbs Dep.65:15-23; Bictoria Decl. 13; Camarena Decl. 15; Harris Decl. 15; Lopez Decl. 15; Milner Decl. 19; Salmeron Decl. 12; Valerio Decl. 13; Garcia M. Decl.; Garcia S. 13; Der Decl. 17; Yi Decl. 13; Fleck Decl. 15; Doornbos Decl. 13.

Without evidence, Plaintiffs claim that bag check logs appear "to be forms that were filled out on a daily basis…." (ECF 87-1, ¶ 24). Hubbs never saw or completed a log while employed. (Hubbs Dep. 128:1-129:11). Coleman testified that bag check logs stopped being used at the beginning of 2015. (Coleman Dep. 150:16-151:2). Boas testified that bag check logs were "not a program" that was "universally in place" and were not used at every store.[11] (Boas Dep. 115:16-23).

E. Big Lots' Lawful Rest Break Policy and Practice.

Big Lots maintains a lawful rest break policy in its Handbook. (Jeric Dep. 117:1-19, Ex. 9, Handbook, "Rest Breaks and Meal Periods"). Employees are trained on the Policy when they are hired. (Jeric Dep. 50:6-10). The Policy applies to employees working overnight shifts. (Jeric Dep. 99:5-22, 117:3-15, Ex. 9; Boas Dep. 272:20-273:13). Human Resources checks with associates and reviews schedules to ensure that associates are taking breaks. (Jeric 48:2-13).

Associates are instructed to notify a supervisor if they do not take a rest break. (Jeric Dep. 86:2-89:6, Ex. 01, Handbook, "Rest Breaks and Meal Periods"). The Company investigates complaints and instructs payroll to pay a penalty if it determines an employee did not get a break.[12] (Jeric. Dep. 147:7-14; Boas Dep. 259:25-260:12, Ex. 26, at 1 "Break & Lunches Best Practices"). Boas was unaware of any such complaints. (Boas Dep. 259:25-260:12). Jeric was aware of three such complaints during her entire time at Big Lots. (Jeric Dep. 24:11-12; 28:2-29:21, 30:17-20). One complaint was several years ago and Jeric testified a penalty was paid; the second complainant worked insufficient hours to be eligible for breaks; and the third complainant received breaks, just not at the time she wanted. (*Id.*)

[11] The Company searched 20 stores, and found logs at only six stores, many of which only had logs for a few months, while others had large gaps of time for which there were no logs. (Jeric Decl. 9-10). The logs that were found are often partially complete, omit last names, omit the time, or round the time to the nearest hour/half-hour. (Boas Dep. 281:12-286:3, Ex. 12; Jeric Decl. 9, Ex. 1).

[12] Because rest breaks are "on the clock," there are no records that indicate when a rest break is missed, and thus no feasible way to develop an "automatic pay" system like Big Lots has for meal breaks. (Jeric Dep. 125:24-25).

Plaintiffs were aware of the Policy. (Williams Dep. 51:11-52:3; Hubbs Dep. 33:10-18; Coleman Dep. 75:8-77:24). Hubbs admitted that she took her rest breaks. (Hubbs Dep. 84:11-14). Coleman made sure the associates he supervised received rest breaks, and does not recall anyone complaining about not receiving a break. (Coleman Dep. 84:21-86:17, 88:1-5, 99:12-21).

Associates across California declared that they were aware of the Policy, they were reminded of it by managers, their rest breaks were written onto schedules, and they were always able to take their full rest breaks uninterrupted.[13]

F. Big Lots' Lawful Overnight Meal Break Policy and Practice.

Big Lots maintains a lawful meal period policy in its Handbook, which specifically states that employees may leave the store during meal periods. (Jeric Dep. 99:5-22, 117:16-19, Ex. 9). The policy applies to overnight shifts, which typically last from Midnight to 6:00 or 7:00 a.m. (Jeric Dep. 99:5-22, 117:16-19, Ex. 9; Boas Dep. 272:20-273:13, 278:13-15). Meal breaks for overnight shifts are scheduled each day. (Tuscher Decl. 4; Serrato Decl. 3; Algarsamy Decl. 3). Big Lots' computer system automatically pays a meal period premium to an associate who does not clock out, or clocks out late, for a required meal period. (Unocic Depo. 185:14-186:1; Jeric Depo. 123:11-13; Boas Depo. 278:1-4).

Plaintiffs were aware of the meal break policy. (Williams Dep. 51:11-52:3; Hubbs Dep. 33:10-18; Coleman Dep. 78:2-79:2). When Williams worked an overnight shift, breaks were announced over the PA system, everyone working took

[13] Aguilar Decl. 9-11; Albanez Decl. 10; Aquilina Decl. 11, 13; Bictoria Decl. 9-11; Bun Decl. 10-13; Camacho Decl. 9-11; Camarena Decl. 9-13; Casillas Decl. 9-12; Cesena Decl. 10-12; Delgado Decl. 9, Der Decl. 12, 15; Diaz Decl. 10-13; Doornbos Decl. 9-13; Duran Decl. 10-13; Fleck Decl. 10, 12, 13; Garcia, M. Decl. 10-14; Garcia, S. Decl. 9, 11m 12; Garcia, Y. Decl. 9, 10; Ghanem Decl. 10, 12; Harris Decl. 10, 12, 13; Kennedy Decl. 9-12; Lara Decl. 8, 10; Lopez Decl. 10, 13; Mercado Decl. 10, 14; Milner Decl. 13; Mitchell Decl. 12-15; Oldehaver Decl. 8, 10, 11; Oliva Decl. 9, 11; Rael Decl. 10-13; Saldivar Decl. 9-12; Salmeron Decl. 9; Straub Decl. 10, 12, 13; Torres Decl. 10, 11; Valdez Decl. 8, 10; Valerio Decl. 10-12; Vasquez Decl. 8, 9, 11; Villanueva Decl. 10-13; Yi Decl. 9-12.

their breaks at the same time, and she was always able to take her breaks.[14] (Williams Dep. 82:7-83:5). Hubbs similarly stated that overnight shift employees were able to "hang out and sit around" since the store was not open and they did not "have to worry about customers." (Hubbs Dep. 96:16-97:3). In fact, Defendants' expert found that associates working the overnight shift clocked out for meal breaks at least 97.7% of the time. (Burke Dec. at 28).

Employees working an overnight shift are permitted to leave the store during meal breaks.[15] (Boas Dep. 272:20-273:13; Serrato Decl. 3 ("… [A]ssociates are permitted to leave the store during their meal break…. There is a McDonald's near the store and I have seen associates working these shifts go there during a meal break."); Tuscher Decl. 4 ("Associates are able to leave the store during their meal breaks on the overnight and early morning shifts."); Algarsamy Decl. 3 ("Associates working the overnight shift are permitted to leave the store during their meal breaks."). None of the Plaintiffs testified that they could not leave the store during meal breaks, and Plaintiffs have produced no evidence that anyone was not permitted to leave the store.

G. Calculation of Big Lots' Quarterly Bonuses.

Quarterly bonuses are paid to managers and leads pursuant to the terms of the Bonus Program. (Boas Dep. at 63:18-70:10, 279:7-20, Ex. 4; *see also* ECF 87-25). As the Program states on its face, the bonus is calculated as a percentage of associates' total quarterly earnings, which includes regular pay and overtime. (Boas

[14] *See also* Straub Decl. 8 ("During night shifts, everyone goes at the same time and the freight manager announces when it is time for everyone to take their meal breaks."); Ghanem Decl. 10 ("During the night shift, managers will tell us when to take our breaks.").

[15] Plaintiffs rely upon a paragraph of a 2009 document to argue that overnight crews are required to remain in the store and remain clocked in during meal breaks. Boas stated this paragraph was not current practice, and Plaintiffs have produced no evidence that this paragraph was ever followed. (Boas Dep. 264:19-265:2, 272:14-273:13, Ex. 28). Even if it were, due to Big Lots' automatic meal premium system, associates following the paragraph would be paid for the meal period and receive an additional premium. (Boas Dep. 264:19-265:2, 280:15-19, Ex. 28).

Dep. at 279:21-280:6; Coleman Dep. 176:2-177:25; Williams Dep. 150:7-12; Oakley Decl. at 3-4; *see also* Answers to Special Interrogatories (Set Two) at No. 13; ECF 87-25).[16]

Each time Coleman or Williams received a bonus, it was calculated by taking quarterly earnings, including overtime, and multiplying them by the percentage called for in the Bonus Program. (Oakley Dec. at 5-20; Burke Dec. at 30).

ARGUMENT

A. Standard of Review.

"A party seeking class certification must affirmatively demonstrate his compliance with the Rule … ." *Wal-Mart Stores v. Dukes*, 131 S. Ct. 2541, 2551 (2011). A court may certify a class only if it "is satisfied after a rigorous analysis" that each Rule 23 requirement has been satisfied. *Dukes*, 131 S. Ct. at 2551.

Commonality must be shown by a "common contention" that is "of such a nature that it is capable of classwide resolution – which means that determination of its truth or falsity will resolve an issue that is central to the validity of each one of the claims in one stroke." *Dukes*, 564 U.S. at 338. "[I]t is insufficient to merely allege any common question." *Ellis v. Costco Wholesale Corp.*, 657 F.3d 970, 981 (9th Cir. 2011). "[A] plaintiff must present 'significant proof' that the employer operated under a 'general policy' or practice." *Coleman v. Jenny Craig, Inc.*, 2013 U.S. Dist. LEXIS 176294, *25 (9th Cir. 2013), *citing Wang v. Chinese Daily News*, 737 F.3d 538 (9th Cir. 2013). "'If there is no evidence that the entire class was subject to the same allegedly **unlawful policy** or practice, then there is no question common to the class.'" *Coleman*, *supra*, *citing Ellis*, 657 F.3d at 983 (emphasis added). Furthermore, "[t]o satisfy commonality, there must be significant proof that the entire class has suffered a common injury." *Thomasson v. GC Services Limited*

[16] This method is lawful under federal and California law. *See* 29 C.F.R. § 778.503 (method "includes proper overtime compensation as an arithmetic fact."); *Chavez v. Converse, Inc.*, 2016 U.S. Dist. LEXIS 110305, *4 (N.D. Cal. Aug. 18, 2016).

Partnership, 539 Appx. 809, 810 (9th Cir. 2013), *citing Evon v. Law Offices of Sidney Mickell*, 688 F.3d 1015, 1029 (9th Cir. 2012). The Court "*must* consider the merits if they overlap with the Rule 23(a) requirements," and the Court must resolve factual disputes to the extent necessary to determine whether class certification is appropriate. *Ellis*, 657 F.3d at 981, 983 (emphasis in original).

B. The Complaint Does Not Provide Notice Of Three Subclasses.

None of Plaintiffs' proposed subclass definitions were included in the operative complaint, which identifies one class of all non-exempt employees. *Compare* ECF 87, pp. 1-2 *to* ECF 56, p. 3. This Court denied a motion for class certification for this precise reason[17] in one of the prior cases brought against Big Lots by Plaintiffs' Counsel's prior law firm.[18] Additionally, three of the claims that Plaintiffs now seek to certify – relating to overnight shifts and bonuses – are not identified in the Second Amended Complaint. *Compare* ECF 87, pp. 1-2 *to* ECF 56. Indeed, the words "overnight" and "bonus" do not appear in the complaint.[19] This prejudices Defendants, who would have sought additional discovery and moved for summary judgment had notice been provided.[20] Accordingly, this Court should deny certification of those three proposed subclasses. *See e.g., Amey v. Cinemark USA Inc.*, 2015 U.S. Dist. LEXIS 63524 at *61 (N.D. Cal. May 13, 2015) (to allow class certification "on a theory alleged nowhere in the complaint would be unfair to the defendants and improper as a matter of pleading.").[21]

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[17] *Baker v. Big Lots Stores, Inc.*, CV 08-1450 (C.D. Cal. 2009), copy attached as Exhibit 10 to the Request for Judicial Notice ("RJN") filed concurrently herewith.

[18] Plaintiffs' counsel's prior law firm brought *Baker* and *Ramirez v. Big Lots Stores, Inc.*, Case No. 12CECG00497 (L.A. Sup. Ct. 2012). Plaintiffs in those cases were unsuccessful in obtaining class certification, including (in *Ramirez*) in the unopposed context of a settlement. *See* RJN, Exhs. 10, 12.

[19] Plaintiffs also failed to meet and confer. *See* L.R. 7-3; Knueve Dec. at 8-10.

[20] There are also statute of limitations problems. If Plaintiffs are allowed to proceed with these claims, they will have unfairly allowed the class membership to grow for the three years this case has been pending.

[21] *See also Holak v. Kmart Corp.*, 2014 U.S. Dist. LEXIS 78472 at *76 (E.D. Cal.

C. The Court Should Deny Certification Of The Closing Shift Class.

a. Introduction.

As Plaintiffs appear to agree, Big Lots' closing procedure is that associates should complete all duties, perform bag checks if necessary, clock out, set the alarm, and leave the store. ECF 87, p. 6. Plaintiffs argue that the time between clocking out and setting the alarm is compensable, and propose to compare Big Lots' time records to third parties' alarm records. Plaintiffs' proposal is flawed, and Plaintiffs' expert's analysis is not reliable, in part because there is no synchronization between Big Lots' time clock and the third parties' alarm. *See* Burke Dec. at 7-11. Even if the difference between the systems is slight – e.g., one minute – this difference is significant when Plaintiffs' expert admits that the most common "gap" he found was one minute, and the average "gap" was two minutes.

Moreover, this Court has already rejected the precise theory brought by Plaintiffs, granting summary judgment and stating:

> The brief moments that Plaintiff spent in and around the store after clocking out are an inevitable and incidental part of closing up any store at the end of business hours. There will always be some unaccounted-for seconds spent on setting an alarm, physically leaving the store, locking the door, and walking out at the end of a closing shift [but] not every second can be or need be recorded and compensated.

Troester v. Starbucks, 2014 U.S. Dist. LEXIS 37728 at *13-14 (C.D. Cal. 2014).

b. The subclass does not meet the requirements of Rule 23(a).

Plaintiffs have failed to present "significant proof" of a "general policy" that unlawfully caused a "common injury" to the "entire class." *Coleman*, 2013 U.S. Dist. LEXIS 176294, *15, *16 (refusing to certify subclasses where plaintiff "fails to demonstrate that" the employer's "policies are facially invalid or otherwise applied uniformly to employees in violation of California's labor code"). Big Lots'

June 6, 2014); *Munoz v. Giumara Vineyards Corp.*, 2012 U.S. Dist. LEXIS 93043 at *53 (E.D. Cal. July 5, 2012); *Brown v. Am. Airlines, Inc.*, 285 F.R.D. 546, 581 (C.D. Cal. 2011).

procedure is the same procedure that this Court declared to be lawful in *Troester*. Even Plaintiffs' expert's unreliable analysis concluded that the most common "gap" between clock out and alarm setting was one minute, and the "average gap" was 2 minutes. This time is *de minimis* under *Troester*.

This Court "*must* consider the merits if they overlap with the Rule 23(a) requirements," and resolve factual disputes to the extent necessary to determine whether class certification is appropriate. *Ellis*, 657 F.3d at 981, 983. Here, Plaintiffs have failed to submit "significant proof" of a common unlawful practice.

c. The subclass does not meet the requirements of Rule 23(b)(3).

Individualized issues predominate because determining (1) if a class member spent a non-*de minimis* amount of time off the clock and (2) was under Big Lots' control after clocking out requires an individualized inquiry for each class member on each occasion he or she worked the closing shift.

The evidence shows that most employees working the closing shift did not suffer an unlawful delay. *Supra*, pp. 3-5. Even assuming that some hypothetical class members suffered more than *de minimis* delay, resolving their claims would require individualized inquiry. While Plaintiffs assert that "[i]ndividual issues, for instance, … time spent off the clock [does] not impact the liability analysis at all," (ECF 87 at 11), this argument has been rejected by multiple courts, including this one. *See, e.g.*, *Reed v. Cnty. Of Orange*, 266 F.R.D. 446, 462 (C.D. Cal. 2010) ("[D]etermining whether the time they spent on off-the-clock activities was *de minimis* will necessarily result in individualized inquiry due to the individualized nature of the claims . . . . Accordingly, this factor weighs heavily in favor of decertification."); *Quinlan v. Macy's Corp. Servs., Inc.*, 2013 U.S. Dist. LEXIS 164724, *13 (C.D. Cal. 2013) ("[D]ifferences in waiting times, not only between employees, but also by the same employee on different occasions, might well affect not only a class member's recovery, but the very viability of a particular claim.").

Moreover, the mere fact that an employee was in the store after closing does not establish that the employee was doing compensable work during that time, especially given the brief amounts of time at issue. *See Stiller v. Costco Corp.*, 298 F.R.D. 611, 628 (S.D. Cal. 2014) (individual questions predominated on closing shift claim because "there is no common answer as to whether each class member actually performed uncompensated OTC work"). For example, an employee could clock out and then make a personal phone call or have a conversation with a co-worker before leaving the store.[22] There is no class-wide method of showing that any work was performed during that time.

In *Stiller*, plaintiffs claimed a policy prevented employees working closing shift from exiting until cash was deposited in the vault. The court concluded:

> [D]etermining whether the Alleged Policy existed, was enforced on a companywide basis, and operated in a way that resulted in employees being under Costco's control, will only answer the question of whether employees were sometimes detained without pay as a result of the Alleged Policy. ... Costco has offered convincing evidence that not all employees experienced unpaid delay as a result of the Alleged Policy.... And, if it can only be determined on a classwide basis whether the Alleged Policy sometimes resulted in unpaid [off the clock] time, individualized determinations will be required to determine the question of liability. This is because liability hinges on whether employees actually performed [off the clock] work.

Id. at 20 (emphasis original). As in *Stiller*, individualized issues predominate here because there is no common answer as to whether class members performed compensable work between clocking out and leaving the store. Accordingly, class certification should be denied. *See Stiller*, 298 F.R.D. 611; *Koike v. Starbucks Corp.*, 378 Fed. App'x 659, 661-62 (9th Cir. 2010) (affirming denial of class certification based on finding that "individualized factual determinations were required to determine whether class members did in fact engage in OTC work and whether [the employer] had actual or constructive knowledge of the OTC work performed.").

For these same reasons, Plaintiffs have failed to establish that a class action is the superior method of resolving closing time claims. Determining what employees were doing after clock out, and for how long, would result in unmanageable mini-trials for each class member. Plaintiffs have offered no class-wide method of determining if an employee was performing compensable work after clock out. The only method Plaintiffs have offered for determining how long an employee was in the store is by comparing alarm records to the punch data, which is unreliable. Even if it is possible to determine now the different times used by the alarm system and the time clock, it would require determining that difference at each store for each point in time throughout the class period. Plaintiffs have failed to establish superiority and the closing shift class should not be certified.

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[22] Plaintiffs' proposed class includes assistant managers (ECF 87 at 8), who had keys to the store and were in control of when they left. The fact that managers were in the store after clock out does not establish that they were under Big Lots' control.

D. The Court Should Deny Certification Of The Security Inspection Class.

a. The proposed subclass is not ascertainable.

A class definition should be "precise, objective, and presently ***ascertainable***." *O'Connor v. Boeing North American, Inc.*, 184 F.R.D. 311, 319 (C.D. Cal. 1998) (emphasis added). *See also Williams v. Oberon Media, Inc.*, 468 Fed.Appx. 768, 770 (9th Cir. 2012). Plaintiffs' proposed class is not ascertainable because it cannot be determined which employees "were subject to security checks at Big Lots stores." (ECF 87 at 12). Although Plaintiffs' Motion falsely states that all employees undergo a check, all of the competent evidence establishes that (at most) only employees who brought bags had a check.[23] *See Supra*, pp. 5-6. Moreover, there are not complete or useable records regarding bag checks. *Id.* at 7. Determining which employees belong in the class requires individual inquiries, and the class is not presently ascertainable. *See Ogiamien v. Nordstrom, Inc.*, 2015 U.S. Dist. LEXIS 22128, *12 (C.D. Cal. Feb. 24, 2015) (denying certification of bag check class in part due to lack of ascertainability where "not every employee carried a bag and not every employee with a bag was checked"); *Quinlan*, 2013 U.S. Dist. LEXIS 164724 (denying certification of bag check class in part because it was not possible to determine which employees brought bags to work).

[23] Some stores did not perform bag checks at all. *Supra* at p. 5.

b. The subclass does not meet the requirements of Rule 23(a).

As is set forth in more detail below, Plaintiffs have not presented significant proof that their proposed common questions are susceptible to common answers that will drive this litigation. (ECF 87, p. 12). Plaintiffs are also not "typical" of any hypothetical class members who were required to have a check even without a bag. Additionally, there is an inherent conflict of interest within the proposed class, which includes managers responsible for enforcing Big Lots' policies (and doing checks on the clock), and associates who allege that those policies were violated. *Howard v. Gap, Inc.*, 2009 U.S. Dist. LEXIS 105196, n.3 (N.D. Cal. 2009).

c. The subclass does not meet the requirements of Rule 23(b)(3).

Individual inquiries predominate over the "common questions" proposed by Plaintiffs and there is no manageable way to answer the questions on a class-wide level. Plaintiffs' first question asks whether Big Lots had a policy requiring employees to undergo security checks. There is no manageable way to determine who received a check on any given day because there is no manageable way to determine who brought a bag on any given day. *See Ogiamien*, 2015 U.S. Dist. LEXIS 22128, *12; *Quinlan*, 2013 U.S. Dist. LEXIS 164724.

Plaintiffs' second question asks whether security checks were done without compensation, but the answer to that question also requires unmanageable individual inquiry. While Plaintiffs have testified that their checks were off the clock, other associates declared that bag checks were "on the clock" or simultaneous with clocking out.[24] *Supra* at p. 6.

Plaintiffs' third question asks whether Big Lots was required to compensate employees for checks, but the answer is dependent upon (1) whether (contrary to policy) any manager required associates to be checked even if the associate did not bring a bag; (2) whether (contrary to policy) any check was done off the clock; and

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[24] Bag checks, if any, were done where associates clock out. *Supra* at p. 6.

(3) whether a check was sufficiently brief to be *de minimis*. *Reed v. Cnty. Of Orange*, 266 F.R.D. 446, 462 (C.D. Cal. 2010) ("[D]etermining whether the time they spent on off-the-clock activities was *de minimis* will necessarily result in individualized inquiry due to the individualized nature of the claims . . . . Accordingly, this factor weighs heavily in favor of decertification."); *Quinlan*, 2013 U.S. Dist LEXIS 164724, at *13 ("[D]ifferences in waiting times, not only between employees, but also by the same employee on different occasions, might well affect not only a class member's recovery, but the very viability of a particular claim.")

Individualized inquiries predominate, and a class action is also not superior or manageable. The Ninth Circuit recently affirmed denial of certification because "there was no reasonably efficient way to determine" which class members were harmed, and therefore a class action was not a superior method of adjudication. *See Martin v. Pacific Parking Systems, Inc.*, 583 Fed.Appx. 803, 804 (9th Cir. 2014), *cert. denied*, 135 S. Ct. 962 (2015); *see also Pierce v. County of Orange*, 526 F.3d 1190, 1200 (9th Cir.), *cert. denied*, 555 U.S. 1031 (2008) (affirming decertification of class because "Rule 23(b)(3) would not offer a superior method for fair and efficient adjudication in light of expected difficulties identifying class members"). Plaintiffs have proposed no manageable way of determining who had bag checks, or who (if anyone) was allegedly harmed.[25] The class should not be certified.

E. The Court Should Deny Certification Of The UCL Rest Break Premiums Class.

a. The subclass does not meet the requirements of Rule 23(a).

Plaintiffs have not established commonality because they have not submitted

[25] Plaintiffs have also failed to offer a damages plan. Plaintiffs' expert proposes to come up with a plan, but Plaintiffs were required to come forward with a plan at certification, not promise to provide a plan later. *Comcast v. Behrend*, 133 S.Ct. 1426 (2013). Even Plaintiffs' vague proposals are unworkable because the 9th Circuit has "consistently held" that sampling and representative testimony may not be "expanded into the realm of damages." *Jimenez v. Allstate Ins. Co.*, 765 F.3d 1161, 1167 (9th Cir. 2014); *Spears v. First Am. eAppraiseIT*, 2014 U.S. Dist. LEXIS 130521, *65 (N.D. Cal. 2014). *See also* Burke Dec. at 7-8.

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"significant proof" that the entire class was subject to an unlawful practice. Plaintiffs claim that Big Lots "had no mechanism in place to monitor or pay rest break premiums," ECF 87 at 17, but this is contradicted by the evidence. *Supra* at p. 7. Additionally, resolution of the Plaintiffs' proposed common questions (ECF 87, p. 15) are not "apt to drive the resolution of the litigation," because, as is explained below, each class member would still need to establish that she was denied a break.

Plaintiffs also cannot establish typicality because the proposed class includes managers responsible for enforcing the rest break policy and associates alleging that the policy was violated. *Gap*, 2009 U.S. Dist. LEXIS 105196 at n.3.

b. The subclass does not meet the requirements of Rule 23(b)(3).

Even if Plaintiffs could prove that Big Lots "admitted" a policy of not paying rest break premiums (which they cannot), it would not establish a violation on a class-wide basis. Courts regularly hold that an "employers' liability springs not simply from a defective policy, but from proof that rest breaks were unlawfully denied." *Burnell v. Swift Transp. Co of Ariz., LLC*, 2016 U.S. Dist. LEXIS 181372, *11 (C.D. Cal. May 4, 2016) (collecting cases); *Cummings v. Starbucks Corp.*, 2014 U.S. Dist. LEXIS 51970, *60 (C.D. Cal. Mar. 24, 2014) (denying certification where plaintiff alleged that defendant "failed to pay rest break penalties" because "that claim depends on proving that the class was entitled to a rest break and did not receive one"); *Ordonez v. Radio Shack, Inc.*, 2013 U.S. Dist. LEXIS 7868, *38 (C.D. Cal. 2013) (denying certification because "whether putative class members were actually provided or deprived of the rest breaks owed to them requires individualized inquiries."); *In re Taco Bell Wage & Hour Actions*, 2013 U.S. Dist. LEXIS 380 (E.D. Cal. Jan. 2, 2013) (despite facially invalid policy, denying certification due to lack of class-wide proof due to lack of records of rest breaks); *In re Autozone, Inc.*, 2016 U.S. Dist. LEXIS 105746, *46 (N.D. Cal. Aug. 10, 2016) (decertifying rest break class where "there are no records of rest breaks" because "assessing class members' claims of lost rest breaks requires an individual analysis"). These principles are particularly applicable here, where Hubbs and numerous other associates testified that they received rest breaks, and Coleman testified that he ensured that everyone in his store took breaks.[26] *Supra* at p. 8.

In *Cummings v. Starbucks*, the court found that individual questions predominated because the plaintiff lacked classwide proof of which employees were denied rest breaks. 2014 U.S. Dist. LEXIS 51970, *60. The plaintiffs alleged *inter alia* that the employer lacked a policy providing for rest break premiums. *Id.* at *16-*17. However, the court reasoned that it could not "rely on uniform policies to the near exclusion of other relevant factors touching on predominance." *Id.* at *54 (citing *Abdullah v. U.S. Sec. Assoc. Inc.*, 731 F.3d 952 (9th Cir. 2013)). The court held that a class could not be certified based on the lack of a policy providing for rest break premiums because that claim "depends on proving that the class was entitled to a rest break and did not receive one." *Id.* at *60.

Plaintiffs do not even attempt to address these individualized questions. Their sole proposal is to calculate an alleged "meal break violation percentage" and apply it to the total shifts eligible for rest breaks. ECF 87-40, ¶ 38, 41. This proposal is seriously flawed and should be given short shrift by this Court. Plaintiffs provide no foundation, and there is no reason to believe, that a "meal break violation percentage" has anything to do with rest breaks. *See* Burke Dec. at 17. In fact, Plaintiffs' proposal is "trial by formula" that has been rejected by the Supreme Court. *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541, 2561 (U.S. 2011). Even if Plaintiffs' proposal made any sense, it does not address who (if anyone) was denied a rest break.[27]

Individualized inquiries predominate and the subclass is not manageable because even if Plaintiffs could establish that Big Lots had a policy of not paying rest break premiums (which they cannot), there is no class-wide proof of who (if anyone) was denied rest breaks, and who (if anyone) is owed rest break premiums.

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[26] This also distinguishes this case from *Safeway v. Superior Court*, 238 Cal. App. 4th 1138, 1158 (2nd Dis. 2015), upon which Plaintiffs rely. In *Safeway* (a meal break, not rest break, case) the court found evidence of a "deep, system-wide error" in the provision of meal breaks. Here, there is no remotely similar evidence.

[27] For these same reasons, Plaintiffs have failed to present a workable damages plan.

F. The Court Should Deny Class Certification Of The Overnight Shift Class And The UCL Meal Period Premiums Class.[28]

a. The subclass does not meet the requirements of Rule 23(a).

Plaintiffs falsely state that associates working the overnight shift were not permitted to leave the store during meal breaks, relying upon one paragraph of a dated statement that is not found in the Handbook and which was disavowed by Boas.[29] Plaintiffs produce no evidence that any associate was actually prohibited from leaving the store, and Big Lots has presented evidence that associates working the overnight shift were permitted to leave the store during breaks.[30] *Supra* at p. 9. Plaintiffs have failed to establish commonality because they have failed to present "significant proof" of a "practice" that unlawfully caused a "common injury" to the "entire class." Additionally, even *assuming arguendo* that some hypothetical class members were on some occasions prohibited from leaving the store, that did not apply to all class members. Thus, Plaintiffs' proposed "common questions" are not susceptible of "common answers" across the class.

Plaintiffs have also not established that they have standing to bring this claim, or that they are typical of any hypothetical associates who were required to remain in the store during meal breaks, since they have presented no evidence that they were required to remain in the store during meal breaks.[31]

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[28] Plaintiffs claim that class members were prohibited from leaving the store during rest breaks. ECF 87, pp. 18-19. California law does not require employers to allow employees to leave the premises during rest breaks. *Klune v. Ashley Furniture Indus., Inc.*, 2015 U.S. Dist. LEXIS 44855, *21 (C.D. Cal. Apr. 3, 2015) ("Since employees are paid for their rest periods, they can be required to remain on the employer's premises during such periods.").

[29] The paragraph instructs associates on the overnight shift not to clock out for meal breaks. Associates following the paragraph would be paid for the meal break time and would also receive a meal period premium. *Supra, n 15.*

[30] Defendants' expert found that associates on the overnight shift clocked out for meal breaks at least 97.7% of the time. Burke Dec. at 28.

b. The subclass does not meet the requirements of Rule 23(b)(3).

Individualized inquires predominate because there is no class-wide way to determine whether any associate was actually prohibited from leaving the store. Additionally, because Big Lots' system automatically pays a penalty if an associate does not clock out for a meal break, the Court would have to determine whether a hypothetical associate may have been prohibited from leaving the store, but already received a meal penalty. These individualized inquiries are further complicated because Plaintiffs appear to argue (without evidence) that associates who clocked out for meal breaks were prohibited from leaving the store (which would be contrary to the "policy" upon which Plaintiffs purportedly rely for this claim).

In *Rai v. CVS Caremark Corp.* this Court denied class certification where the plaintiffs offered no evidence of a common policy that managers were not permitted to leave stores during their meal breaks. 2013 U.S. Dist. LEXIS 177730, *23 (C.D. Cal. Oct. 11, 2013). The parties submitted competing testimony as to whether managers were permitted to leave. *Id.* at *23-24. The court determined that "[t]his competing testimony is insufficient … to find that CVS had a common practice or policy" and, thus, held that individual issues predominated and that a class action was not superior to individual litigation. *Id.* *24-26.

Plaintiffs here have not demonstrated a common policy, nor any anecdotal violations of law, nor have they presented proposals for trying this case or determining damages on a class-wide basis. Individualized inquiries predominate, and Plaintiffs have not established that a class action is manageable or superior.

G. The Court Should Deny Certification Of The Regular Rate Class.

a. The class does not meet the requirements of Rule 23(a).

This Court "*must* consider the merits if they overlap with the Rule 23(a)

[31] Williams was able to take all of her breaks on the overnight shift. *Supra*, pp. 8-9.

requirements," and must resolve factual disputes to the extent necessary to determine whether class certification is appropriate. *Ellis*, 657 F.3d at 981, 983. Here, there is no real factual dispute – Plaintiffs have not produced competent evidence to substantiate their claim that Big Lots does not include overtime in its bonus calculations. To the contrary, as is set forth above, Big Lots calculates quarterly bonuses as a percentage of an associate's quarterly earnings, including overtime. *Supra*, pp. 9-10; *see also* Burke Dec. at 30. This is permissible under federal law and California law. *See* 29 C.F.R. § 778.210; *Chavez v. Converse, Inc.*, 2016 U.S. Dist. LEXIS 110305, *8 (N.D. Cal. Aug. 18, 2016) ("Converse may provide bonuses based on a percentage of total earnings and fully discretionary merit awards without recalculating the regular rate of pay.").

Because Plaintiffs have failed to submit "significant proof" of a common unlawful practice relating to the quarterly bonus, the claim should not be certified. *Coleman*, 2013 U.S. Dist. LEXIS 176294 (refusing to certify subclasses where plaintiff "fails to demonstrate that" the employer's "policies are facially invalid or otherwise applied uniformly to employees in violation of California's labor code").

Furthermore, because the Declaration of Teresa Oakley establishes that Coleman and Williams were paid bonuses in compliance with the law, Plaintiffs have not established that they are typical of any proposed class members who might have a claim, or that they have standing to pursue this claim.

b. The class does not meet the requirements of Rule 23(b) .

Since Big Lots' policy complies with the law, any underpayment could only arise out of individualized deviations from the policy. Plaintiff has pointed to no such instances, but assessing whether there are any would require individualized inquiry. As such, certification of the "regular rate" class should be denied. *See Coleman*, 2013 U.S. Dist. LEXIS 176294, *36 (certification denied on predominance grounds where policy was facially lawful, and any unlawful activity must have arisen out of individualized violations not pursuant to common policy).

H. The derivative claims should not be certified.

Plaintiffs seek certification of certain derivative penalty claims in connection with some of their proposed classes. *See* ECF 87, pp. 1-2, FN 3, 5, 7. Plaintiffs have failed to meet their burden of establishing that each Rule 23 requirement is satisfied as to these claims. Claims for derivative penalties such as inaccurate wage statements and waiting time penalties are not simply add-ons that automatically attach to Plaintiffs' other claims. They have separate statutory schemes with elements fundamentally different than those at issue in Plaintiffs' other claims.[32]

For example, to establish a claim for waiting time penalties, an employee must establish that he was terminated and that the failure to provide all wages in the final paycheck was "willful." *Supra*, fn. 32. Here, none of Plaintiffs' proposed classes include only terminated employees, none of Plaintiffs' proposed common questions deal with willfulness, and Plaintiff has not even attempted to describe a class-wide method of establishing "willfulness."[33] Nor do Plaintiffs substantively address any of the other derivative penalty claims in their motion.

Plaintiffs have not met their burden, and the derivative penalty claims should not be certified.

I. Plaintiffs' counsel has not shown that he is an adequate representative.

"Because class counsel seeks to determine the rights of absent putative class

[32] To establish a claim for waiting time penalties, an employee must establish that he was terminated and that the failure to provide all wages in the final paycheck was "willful." Cal. Lab. Code § 203; *see also Lewis v. Wendy's Int'l*, No. 09-07193, 2009 U.S. Dist. LEXIS 132013, at *3, *18 (C.D. Cal. Dec. 29, 2009). To establish a claim for inaccurate wage statements, an employee must show (i) a violation of the statute; (ii) that the violation was knowing and intentional; and (iii) that an injury resulted from the violation. *Achal v. Gate Gourmet, Inc.*, No. 15-cv-01570, 2015 U.S. Dist. LEXIS 92148, at *56 (N.D. Cal. July 14, 2015).

[33] Given that Big Lots policies are facially lawful, and the evidence of record does not establish anything near systemic, wide-spread violations of law, Plaintiffs could not establish willfulness on a class-wide basis.

members, a court must carefully scrutinize the adequacy of representation when considering whether to certify a class." *Sweet v. Pfizer*, 232 F.R.D. 360, 371 (C.D. Cal. 2005). Here, two associates have left Plaintiffs' counsel's firm and withdrawn as counsel within the last year. (ECF 57, 76). In seeking to delay briefing in this case, Plaintiffs' counsel attributed his need for more time to these withdrawals.[34] As of this filing, no other attorneys have entered an appearance on behalf of Plaintiffs.[35] Given these acute staffing problems, Plaintiffs fail to demonstrate that counsel has the resources to adequately represent six subclasses. *See English v. Apple Inc.*, 2016 U.S. Dist. LEXIS 1555 at *47-48 (N.D. Cal. Jan. 5, 2016).

Plaintiffs have not established that counsel has the experience necessary to adequately represent six subclasses. Plaintiffs' counsel was a co-founder, with Marc Primo, of Initiative Legal Group (ILG). RJN at ¶ 2. At some point, Plaintiffs' counsel started to work under the Yablonovich Firm name as co-counsel with ILG.[36] RJN at ¶ 3, Ex. 3. Virtually all of the cases that Plaintiffs' counsel identifies in his Declaration as qualifying experience were ILG cases from many years ago. The dockets of some of those cases do not reflect that Plaintiffs' counsel even entered an appearance. RJN at ¶ 3, Ex. 3.

Plaintiffs' counsel's past conduct also calls into question his adequacy.[37] In 2012, Plaintiffs' counsel was sued in a class action alleging legal malpractice and breach of fiduciary duty. It has been alleged in *Cutting v. Yablonovich et al.* that Plaintiffs' counsel entered into a secret supplemental settlement with Wells Fargo on behalf of a class of approximately 600 clients, without notice to the class, and that Plaintiffs' counsel "maneuvered to convert the entire $6 million settlement into attorneys' fees." *See* RJN at Ex. 4. The *Cutting* case remains pending.[38] *Id.*

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[34] Plaintiff's counsel has "attempted to hire another attorney to assist him with [his] caseload, but has been unable to do so." RJN ¶ 1, Ex.1.

[35] Plaintiffs were represented at a recent 30(b)(6) deposition by Richard Hutchinson, who described himself as an "independent attorney" unaffiliated with any law firm. (Zucalla Dep., p. 40.) Plaintiffs' counsel, the sole remaining attorney of record for Plaintiffs, did not attend. Mr. Hutchinson indicated his intent to file a Notice of Appearance "within the next day or so," but has not done so. *Id.*

[36] ILG later became Capstone Law, APC, the firm for whom Plaintiffs' counsel substituted in this case. *See* ECF 9.

[37] Courts may deny certification based on counsel's past actions. *Viveros v. VPP Group, LLC*, 2013 U.S. Dist. LEXIS 97997 at *29-30 (W.D. Wis. July 15, 2013); *Bodner v. Oreck Direct, LLC*, 2007 U.S. Dist. LEXIS 30408 at *7 (N.D. Cal. 2007).

Also in 2012, the Yablonovich Firm and ILG were co-counsel in *Eric Clarke v. First Transit*, Case No. 2:07-cv-06476. Attorneys associated with both firms were accused of violating orders of this Court. RJN at Ex. 5, ¶¶ 4-6. On November 21, 2012, Judge Feess found ILG in contempt of Court. RJN at ¶ 6, Ex. 6.[39]

The pending allegations of misconduct, the fact that most of Counsel's cited experience is derived from the defunct and previously sanctioned ILG, and the obvious staffing problems, all raise substantial doubts as to the ability of Plaintiffs' counsel to adequately represent the proposed classes.

CONCLUSION

Plaintiffs' Motion for Class Certification should be denied in its entirety.

Respectfully submitted,

Dated: March 20, 2017

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[38] Plaintiffs made no effort to identify or explain the *Cutting* case, but the Court must consider it. *Farms v. Calcot, Ltd.*, 2010 U.S. Dist. LEXIS 93548 at *18 (E.D. Cal. Aug. 23, 2010) ("this Court will take into account any prior failure to proceed in the best interests of putative class in litigation ….").

[39] Plaintiffs' counsel was co-counsel in *Gregory Parker v. Fedex National LTL, Inc.*, Case No. 2:11-cv-638. RJN at ¶ 7, Ex. 7. No counsel for plaintiff appeared for a May 2, 2011 scheduling conference. *Id.* at ¶ 8. The Court ordered counsel to show cause, but no response was filed. *Id.* Instead, Plaintiff settled his claims. *Id.* at ¶ 9.

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on March 20, 2017, the foregoing was filed with the Clerk of the Court for the United States District Court for Central District of California via the Court's CM/ECF system.

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the Court's CM/ECF system.

/s/ Mark A. Knueve
Mark A. Knueve